Supreme Court, U. S.
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No. 80-476

In the Supreme Court of the United States

October Term, 1980

PETER T. DeMARCO,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, STATE BOARD OF MEDICAL EDUCATION AND LICENSURE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF COMMONWEALTH OF PENNSYLVANIA

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STATUTE:

Medical Practice Act of 1974, Act of July 20, 1974, P.L. 551, No. 190, as amended (63 P.S. §421.15)	4, 5

COUNTER-STATEMENT OF QUESTION INVOLVED

Does disciplinary sanction against a physician in one state based upon disciplinary sanction against that physician in another state provide the physician with due process of law when the latter disciplinary sanction is based not only upon the fact of the previous disciplinary sanction, but also upon a consideration of the reasons for that sanction?

COUNTER-STATEMENT OF THE CASE

Since August 28, 1958, until May 24, 1978, Peter T. DeMarco held a license to practice medicine and surgery in the Commonwealth of Pennsylvania. While he continued to maintain a license in Pennsylvania, he also secured a license in New Jersey and chose to establish his practice in that state. He continued to practice in New Jersey until his license there was summarily suspended on August 26, 1976.

In January, 1977, when he could no longer practice in New Jersey, Dr. DeMarco moved his practice across the border to Morrisville, Pennsylvania. Immediately, the Pennsylvania Board of Medical Education and Licensure (hereinafter referred to as the Board) issued a citation and notice of hearing to Dr. DeMarco based upon the summary suspension of his license by the New Jersey State Board of Medical Examiners and his apparent failure to comply with Pennsylvania's malpractice insurance requirements.

The Board began a hearing on these matters in February, 1977, at which time Dr. DeMarco provided evidence of compliance with the malpractice insurance requirements. Since the New Jersey State Board of Medical Examiners had yet to provide Dr. DeMarco with a final hearing relating to his activities there, the Board believed its citation premature and chose to postpone formal action until such time as the New Jersey Board issued a final order in the matter. During this time, Dr. DeMarco continued to practice in Pennsylvania.

The New Jersey Board began holding disciplinary hearings on March 7, 1977, and the hearings continued for twenty-seven (27) days ending on May 3, 1977. Decision was reserved and approximately 150 pages of briefs and 39 volumes of testimony were submitted to the hearing officer. The hearing officer's recommendation and report was submitted to the New Jersey Board in December, 1977. It details findings of gross incompetency in the practice of medicine in that Dr. DeMarco was found to have utilized common syringes for inoculation without performing proper sterilization procedures; to have used an experimental and unproven drug, Procaine PVP, on his patients without evidence of its efficacy and without performing proper histories and physical examinations; and to have administered Procaine PVP in an unsanitary manner resulting in ninety-two (92) reported cases of hepatitis in his patient population. The New Jersey Board issued an order of revocation on January 12, 1978.

Immediately upon receipt of this order, the Pennsylvania Board issued an amended citation and notice of hearing. A formal hearing was held before the Board on March 14, 1978. In its case in chief, the Commonwealth presented evidence of the charges brought against Dr. DeMarco in New Jersey; the order of the New Jersey Board revoking Dr. DeMarco's license; and the report of the New Jersey hearing examiner which was adopted by the New Jersey Board and which specified the reasons for revocation. The report of the New Jersey hearing examiner contained an analysis of the evidence presented before him, his specific findings of facts and conclusions of law, and the reasons he presented for each of his findings of facts, conclusions of law and recommendation to revoke

Dr. DeMarco's license to practice as a physician in New Jersey.

On April 18, 1978, the Board voted to revoke Dr. DeMarco's license. Disciplinary action was predicated upon violation of Section 15 (a) (4) of the Medical Practice Act, Act of July 20, 1974, P.L. 551, No. 190, as amended, 63 P.S. §421.15, which proscribes having one's license to practice medicine or surgery suspended or revoked in another jurisdiction. Revocation was the sanction decided upon because the Board concluded that Dr. DeMarco's conduct in New Jersey involved gross departures from acceptable standards of medical practice in Pennsylvania as well as in New Jersey (A. 5 Finding of Fact 7, A. 7). On May 24, 1978, the Board issued the adjudication and order of revocation, which was the basis for the petition for review in the Pennsylvania Commonwealth Court, ensuing petitions for allowance of appeal and applications for reconsideration to the Supreme Court of Pennsylvania, and is the basis for this petition for writ of certiorari.

REASON FOR DENYING THE WRIT

Disciplinary sanction against a physician in one state based upon disciplinary sanction against that physician in another state does not deny the physician due process of law when the latter disciplinary sanction is based not only upon the fact of the previous disciplinary sanction, but also upon a consideration of the reasons for that sanction.

In the disciplinary proceeding before the Board, Petitioner was found guilty of violating Section 15 of the Medical Practice Act of 1974, *supra,* which provides:

> "(a) The board shall have authority to refuse, revoke or suspend the license of a physician for any or all of the following reasons:
>
> * * *
>
> "(4) Having his license to practice medicine and surgery revoked or suspended or having other disciplinary action taken, or his application for a license refused, revoked or suspended by the proper licensing authority of another state, territory or country."

Petitioner contends that the proceeding before the Pennsylvania Board, as conducted, deprived him of property without due process of law. He argues that the Board was unable to exercise its discretion on the basis of the evidence that it had before it and that it accepted a revocation of his license in another state as an irrebuttable

presumption that he was unfit to practice medicine in Pennsylvania.

There was no presumption that Petitioner had his license to practice medicine revoked in New Jersey. Revocation of his license in New Jersey is a matter of uncontroverted fact. In the proceeding before the Board, the Commonwealth presented no evidence of improper conduct within the geographic borders of Pennsylvania; however, geographic distinctions are irrelevant when considering how departures from acceptable standards of medical practice impact upon a physician's fitness to continue to practice medicine.

In *Selling v. Radford,* 243 U.S. 46 (1917), this Court considered a petition to disbar a member of the Bar of the Supreme Court of the United States based upon his previous disbarment by a State Court for personal and professional misconduct. In addressing the question of how the attorney's conduct before the Bar of another jurisdiction impacts upon his fitness to practice before the Bar of the Supreme Court of the United States, this Court stated:

> ". . . the continued possession of a fair private and professional character is essential to the right to be a member of this Bar. It follows, therefore, that the personality of the member and these inherent and prerequisite qualifications for membership of this Bar are indivisible; that is, inseparable. They must, if they exist, follow the personality of one who is a member of the Bar, and hence their loss by wrongful personal and professional conduct, wherever committed, operates everywhere, and must, in the nature of things, furnish adequate reason in every jurisdiction for taking away the right to continue to be a member of the Bar in good standing." (Id. at 49.)

In addressing the issue of the relevancy of improper conduct committed by a physician in a geographic area outside of Pennsylvania, the Commonwealth Court in its opinion cites from *Miles v. Nyquist,* 60 A.D. 2d 133, 400 N.Y.S. 2d 868, 871 (1977), which upheld the revocation of an optometrist's New York license for acts committed in California.

> "The Board did not exceed its authority in proceeding on acts committed outside New York. The statute does not speak on this point (s. Education Law §6509), but to the extent regulation of the profession is undertaken in order to preserve high ethics within the professions, *it would make no sense to require the regulatory agency to ignore misconduct committed outside this state.* Petitioner does not dispute that the fraudulent act he has committed would constitute misconduct if performed in this state." (Emphasis added.) (A. 17-18)

The Board was presented with an abundance of evidence as to Petitioner's misconduct in New Jersey and as to why his license was revoked in that state. The Commonwealth presented the New Jersey citation, the instrument which formalized the charges against the Petitioner before the New Jersey Medical Board; the order of the New Jersey Board revoking Petitioner's license; and the report of the New Jersey hearing examiner which was adopted by the New Jersey Board and which specified the reasons for revocation. In the 100-page report of the New Jersey hearing examiner, the hearing examiner analyzed the evidence presented before him, made specific findings of fact and conclusions of law and discussed the reasons for each of his findings and conclusions.

At issue before the Board was: did the reasons for disciplinary sanction in New Jersey constitute reasons for limiting Dr. DeMarco's practice of medicine in Pennsylvania, and if so, to what extent. The Commonwealth, in its case in chief, presented no evidence pertaining to Petitioner's practice in Pennsylvania since Petitioner was not charged with any improper practice in the Commonwealth of Pennsylvania. However, Petitioner was not deprived of his right to present evidence of his practice in Pennsylvania, or even of his practice in New Jersey, if he wanted to introduce such evidence for its mitigating value. Recognizing the Board's discretion in taking action upon his license, Petitioner introduced Pennsylvania Department of Health investigation reports reflecting his compliance with that Department's directives and sixty (60) letters from his patients which attested to his good reputation. The record reveals that he made no specific offer of evidence which was rejected.

In considering arguments similar to those which Petitioner has set forth in his brief before this Court, the Commonwealth Court of Pennsylvania did not conclude that the Pennsylvania Board's action amounted to a delegation of its authority to the New Jersey Board nor did it conclude that Petitioner was precluded from presenting any relevant evidence. The Commonwealth Court interpreted the subject provision of the Medical Practice Act as an authorization to the Board to impose a disciplinary sanction, not a command. It concluded that a reading of the decision of the Pennsylvania Board confirms that the Board so viewed its powers and duties and had exercised its discretion accordingly. It also concluded that the New Jersey revocation had taken place for reasons which were set forth in the record before the Board and which could be

summarized as unprofessional conduct under Pennsylvania law as well as under New Jersey law (A. 16-17).

Looking beyond the mere fact that Petitioner had his license to practice medicine revoked in New Jersey, the Board concluded:

> "The records support the conclusions by the overwhelming weight of evidence that the Respondent, while licensed in both New Jersey and Pennsylvania, though practicing only in New Jersey, was guilty of a conscious and reckless indifference to the health and safety of his patients, deviated from standard practices of medical care in their treatment, recklessly and wilfully endangered his patients' lives, and inexcusably departed from minimal standards of care and treatment required of a practicing physician in any state." (A. 7)

In *Barsky v. Board of Regents of New York,* 347 U.S. 442 (1954), a physician who had disciplinary action against his license in New York complained that the New York Act, which made conviction of *any crime* a matter for which a license could be suspended or revoked, was overbroad and so far transcended the State's concern for professional standards as to violate the 14th Amendment. Barsky had been convicted of a crime outside the State of New York and the crime did not directly relate to the practice of medicine. This Court rejected Barsky's arguments, stating:

> "This statute is readily distinguishable from one which would require the automatic termination of a professional license because of some criminal conviction of its holder. Realizing the importance of high standards of character and law observance on the

> part of practicing physicians, the State has adopted a flexible procedure to protect the public against the practice of medicine by those convicted of many more kinds and degrees of crime than it can well list specifically. It accordingly has sought to attain this justifiable end by making the conviction of any crime a violation of its professional medical standards, and then leaving it to a qualified board of doctors to determine initially the measure of discipline to be applied to the offending practitioner." (Id. at 452.)

Having a license to practice medicine and surgery revoked, suspended or otherwise limited by the proper licensing authority of any other state is an offense that has a far more rational relationship to the practice of medicine than does the conviction of any crime. As in *Barsky,* supra, the offense is established by statute and then the task remains to the qualified board to determine the measure of discipline to be applied to the offending practitioner. In the present case, the Pennsylvania Board not only had the opportunity to review the grounds for which Petitioner's license was revoked in New Jersey, it had an opportunity to review the New Jersey hearing examiner's analysis of the evidence presented before him in formulating his and the New Jersey Board's ultimate conclusions of fact and law. Petitioner's contention that the Board accepted the revocation of his license in another state as an irrebuttable presumption that he was unfit to practice medicine in Pennsylvania is without merit.

CONCLUSION

Recognizing that the hearing procedure before the Board did not deny Petitioner due process of law and that the decision of the Pennsylvania Commonwealth Court was consistent with both Pennsylvania law and decisions of this Court, the Supreme Court of Pennsylvania denied petitions for allowance of appeal and applications for reconsideration. Respondent respectfully requests that this Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

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